IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

AMY J. WALTERS,

Plaintiff,

v.

MAYO CLINIC HEALTH SYSTEM-
EAU CLAIRE HOSPITAL, INC.,

Defendant.

OPINION & ORDER

12-cv-804-wmc

Plaintiff Amy J. Walters alleges that her former employer defendant Mayo Clinic Health System - Eau Claire Hospital, Inc., discriminated against her based on her disability in violation of the Americans with Disability Act ("ADA"), 42 U.S.C. § 12101 *et seq.* Walters further claims that Mayo retaliated against her when she engaged in protected activity and interfered with her rights under the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq.* Before the court is plaintiff's motion for leave to amend her pleadings to add a hostile work environment claim. (Dkt. #26.) While plaintiff's submission would normally fall short of demonstrating "good cause" under Fed. R. Civ. P. 16, the court will nevertheless grant her leave to amend because (1) defendant was on notice of a hostile environment claim at the time plaintiff filed her administrative discrimination charge and (2) the alleged facts in support of her hostile

environment complaint appear to be the same facts in support of her disparate treatment claim.[1]

BACKGROUND

Plaintiff originally filed a disability discrimination complaint with the Wisconsin Equal Rights Division ("WERD"), receiving her right to sue letter on October 26, 2012. (Compl. (dkt. #1) p.1; *id.*, Ex. (dkt. #1-3).) On November 6, 2012, plaintiff filed this federal lawsuit in the Western District of Wisconsin alleging three causes of action: (1) disability discrimination under the ADA for disparate treatment; (2) disability discrimination under the ADA for failure to accommodate; and (3) violation of the FMLA. (Dkt. #1.) At the preliminary pretrial conference, the court set a scheduling order for this case, including a deadline for amendments to pleadings without leave of court of April 5, 2013. (Pretrial Conf. Order (dkt. #14) ¶ 1.)

On June 19, 2013, plaintiff filed a one-page motion, without a supporting brief or a proposed amended pleading, which seeks leave to amend her pleading to add a claim for hostile work environment because of her disability. (Dkt. #26.) Plaintiff's counsel did file an affidavit accompanying the motion, attaching plaintiff's discrimination charge and interrogatory responses, which plaintiff's counsel characterized as describing "a hostile environment." (Affidavit of Carol Skinner ("Skinner Aff.") (dkt. #27) ¶ 5; *id.*, Ex. 1 (dkt. #27-1).) Plaintiff's counsel also stated that limited discovery had occurred to

[1] In light of the court's decision today and the impending summary judgment deadline, the court will also extend that deadline slightly to permit counsel sufficient time to address the different legal claim before filing dispositive motions.

date and the case was not set for trial until March 2014. (*Id.* at ¶ 6.) Counsel also represented in her affidavit that: "Defendant was aware of Plaintiff's hostile work environment claim from the beginning of this case, has requested and received specific information from this claim, and will not be prejudiced in any way if Plaintiff is permitted to amend her pleadings to specify a hostile environment claim." (*Id.* at ¶ 8.)

In response, defendant argues that (1) plaintiff has failed to provide any reason, let alone good cause, for her two and a half month delay in bringing a formal hostile work environment claim by amended pleading as a matter of right; and (2) the discrimination charge and subsequent proceedings failed to disclose that such a claim was in the mix. (Def.'s Opp'n (dkt. #28).) Without leave of court, plaintiff then filed a reply brief principally responding to defendant's second argument -- that the charge and subsequent administrative proceedings did not disclose this claim -- arguing that plaintiff's discrimination charge adequately described a hostile work environment claim or, in the alternative, a hostile work environment claim is "reasonably related" to her discrimination claims, and therefore plaintiff administratively exhausted this claim as well. (Pl.'s Reply (dkt. #30) 2 (citing *Teal v. Potter*, 559 F.3d 687, 691-92 (7th Cir. 2008)).)[2]

[2] After defendant challenged plaintiff's right to file a reply, plaintiff's counsel filed a letter with the court stating that she mistakenly believed that the briefing schedule set after she filed the motion would include a deadline for filing an *opening* brief. (Dkt. #34.) Given that plaintiff's counsel has practiced in this court for over 20 years on a fairly regular basis, this assumption is inexplicable. Moreover, plaintiff's counsel's filing of a supporting affidavit in conjunction with the motion bellies that assumption. Still, the court has considered plaintiff's reply submission, as well as defendant's "surreply."

OPINION

Where a scheduling order is in place, modification of the order requires a showing of "good cause." Fed. R. Civ. P. 16(b)(4). This standard primarily concerns the "diligence of the party seeking amendment." *Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am.*, 424 F.3d 542, 553 (7th Cir. 2005) (internal citation omitted). Here, plaintiff fails to articulate a clear reason for her delay in seeking leave to amend her complaint. Still, the court finds that granting her motion for leave to amend her complaint solely to add a hostile work environment claim under the ADA, but confined to the facts alleged in support of her disparate treatment claim, best serves the interest of justice for two core reasons.

First, regardless of whether such a claim was the focus of Walters' discrimination charge or whether defendant responded to such a claim in the administrative proceeding, Waters' administrative complaint adequately alleged a hostile environment claim, or at the very least, is "reasonably related" to the discrimination claims reviewed by the WERD. (*See* Skinner Aff., Ex. 1 (dkt. #27-1) 4 ("For the last 3 months of my employment I endured working in a hostile environment . . . ."); *see also Kersting v. Wal-Mart Stores, Inc.*, 250 F.3d 1109, 1118 (7th Cir. 2001) (explaining that a plaintiff may bring allegations in a complaint so long as they are "like or reasonably related to those contained in the charge" and that "[c]laims are reasonably related if there is a factual relationship between them") (internal citations and quotation marks omitted).) As such, defendant was on notice or should have been on notice of plaintiff's claim at the time Walters filed her discrimination charge.

Second, under well-established pleading requirements, a plaintiff need not plead specific legal theories. *Alioto v. Town of Lisbon*, 651 F.3d 715, 721 (7th Cir. 2011) ("[W]e have stated repeatedly (and frequently) that a complaint need not plead legal theories, which can be learned during discovery."). While Walters expressly alleged only disparate treatment and failure to accommodate claims under the ADA in her complaint, the factual allegations could also support a hostile work environment claim, albeit one limited to supervisor conduct that ultimately resulted in a material adverse employment action.[3]

While the court is convinced that allowing amendment serves the interest of justice, the court will limit the amendment to a hostile work environment claim premised on the factual allegations in plaintiff's amended complaint. Rather than permit the plaintiff to file an amended complaint, which may contain additional factual or legal claims inconsistent with this opinion and order, therefore, plaintiff's existing pleading

[3] The court does *not* determine at this stage whether the allegations in her complaint are "so severe or pervasive" to constitute an actionable hostile work environment, especially in light of the open debate as to the viability of that claim under the ADA. *See Mannie v. Potter*, 394 F.3d 977, 982 (7th Cir. 2005) ("Although we have not yet decided whether a claim for hostile work environment is cognizable under the ADA or the Rehabilitation Act, we have assumed the existence of such claims where resolution of the issue has not been necessary."). Defendant remains free to challenge this in a motion for summary judgment and, if necessary, at trial. Moreover, given that Walters' allegations concern supervisors' conduct and given that she was ultimately terminated from the job, it is not clear what, if anything, she gains from bringing a hostile environment claim separate from her disparate treatment and failure to accommodate claims. This observation cuts both ways: on the one hand, plaintiff's motion for leave to amend may not have any material impact on her claims for relief; on the other hand, any prejudice to defendant is limited because of the significant (if not complete) overlap between the new claim and her other claims.

will simply be deemed to include a third count under the ADA for a hostile work environment.

ORDER

IT IS ORDERED that

1) plaintiff Amy J. Walters' motion for leave to amend her complaint (dkt. #26) is GRANTED IN PART AND DENIED IN PART as set forth above; and

2) the revised summary judgment deadline will be November 1, 2013, with responses now due November 22nd, and replies due December 2nd.

Entered this 16th day of October, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge